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Chandran G Nair & Ors v Affin Bank Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1033–05 OF 2013
MOHAMAD ARIFF YUSOF, MAH WENG KWAI AND DAVID WONG JJCA
20 MAY 2014

C

Evidence — Documentary evidence — Admissibility of — Admissibility of certificate of indebtedness ('COI') — Whether COI sought to be introduced through witness who was not its maker inadmissible — Whether bank could not solely rely on amount stated in COI issued to guarantor to recover same amount D *from solicitors in negligence suit — Whether COI provision only applied to bank's agreement with borrower/guarantor and not to bank's retainer agreement with solicitors — Whether COI itself, even if admissible, insufficient to prove quantum of damages suffered by bank due to solicitors' negligence — Whether bank could only recover nominal damages against solicitors — Evidence Act 1950 s 73A(1)*

E

The appellants, who were partners in a legal firm, were engaged by the respondent to take legal action against a borrower and three guarantors for monies owed in respect of banking facilities. The legal action involved the filing of bankruptcy proceedings against a guarantor ('Abdul Rashid'). As the first F bankruptcy notice against Abdul Rashid was held by the court to be defective, the appellants were instructed to file a fresh one but they failed to do so. Three and a half months after that instruction was given, the respondent discovered that Abdul Rashid had been adjudged a bankrupt. Six months after that discovery, the 12-year limitation period for the respondent to enforce its G judgment against Abdul Rashid set in, but up until that date no proof of debt was filed by the appellants against Abdul Rashid's estate on behalf of the respondent. About a year after the limitation had set in, it was discovered that Abdul Rashid had ceased to be a bankrupt. The respondent sued the appellants in the High Court for negligence in the way they had handled the bankruptcy H proceedings which had allegedly caused them to lose the opportunity to have recovered monies owed by Abdul Rashid. In particular, the respondent complained about the appellants' failure to file a proof of debt against Abdul Rashid's estate between the time it was discovered that he was a bankrupt and the date the limitation had set in. The respondent claimed RM5,520,236.77 as I damages from the appellants on the basis this was the sum stated in a certificate of indebtedness ('COI') it had issued to Abdul Rashid. Inter alia, the appellants' defence was that the respondent was blameworthy for not furnishing them with the statement of accounts that would have enabled them to have filed the proof of debt. At the trial, the respondent tendered the COI

through a witness who was not the maker of the document and sought to rely solely upon the COI as proof of the amount of damages claimed against the appellants. The trial judge held that the amount stated in the COI was conclusive proof of the amount Abdul Rashid owed to the respondent and based on that sum, the trial judge held the appellants were 60% negligent in their conduct of the respondent's affairs and the respondent was 40% liable for contributory negligence for failing to furnish the appellants with the statement of accounts to file the proof of debt. The apportionment resulted in the appellants being ordered to pay the respondent RM3,312,142.06. The appellants appealed against the whole of the decision to the Court of Appeal while the respondent cross-appealed against that part of the judgment holding it 40% liable for contributory negligence.

Held:

(1) The respondent failed to prove on balance of probabilities the quantum of damages claimed. No admissible evidence was adduced to prove for the sum of RM3,312,142.06 or any part thereof as damages it had allegedly suffered. The respondent merely relied upon the certificate of indebtedness to prove the quantum claimed but as the maker of the document was not called as a witness and in the face of an objection by the appellants, the certificate of indebtedness was inadmissible in evidence. Even if it was admissible, the certificate itself was insufficient to prove the measure of loss allegedly suffered by the respondent (see paras 26–28).

(2) The certificate of indebtedness was erroneously admitted into evidence by the trial judge and ought to be expunged from the record. The certificate was tendered by PW1 who was not the maker of the document and the appellants had raised an objection against its admittance. There was no evidence to suggest the maker of the certificate was either dead, unfit by reason of bodily or mental condition to attend as a witness or was 'beyond the seas' to come within the ambit of the proviso to s 73A(1) of the Evidence Act 1950. In fact, no evidence was led as to the identity of the person who issued and signed the certificate, let alone to explain to the Court why that person was not called as a witness and why the certificate had to be admitted through PW1. It mattered not whether the certificate was issued under the respondent's letterhead or that it was tendered through the superior officer (PW1) of the maker of the document as there was no provision for such admissibility under s 73A (see paras 33, 34 & 38(f)).

(3) The certificate of indebtedness was issued for the purpose of the loan agreement between the respondent and the borrower and not for the purpose of the retainer agreement between the respondent and the appellants. The respondent could not rely merely on the certificate of

indebtedness to hold the appellants liable for the amount stated in the certificate collaterally. It simply was not a term of the appointment of the appellants as solicitors that any sum stated in the certificate would also become the debt of the solicitors. Furthermore, there was no evidence to show if a conclusive evidence clause existed in the guarantee executed by Abdul Rashid and if there was no such clause, the certificate of indebtedness, even if admissible, would not be conclusive evidence of the amount owed by Abdul Rashid (see paras 38(c)–(d)).

(4) For the respondent to succeed in its claim against the appellants, it had to prove both the fact and the amount of damages that could have been recovered. There was no telling how much the appellants could have recovered from Abdul Rashid on the respondent's behalf if they had not been negligent and had filed the proof of debt. It was not possible, and indeed incorrect, for the trial court to have speculated how much of the debt was recoverable from Abdul Rashid. He was a bankrupt and there was no evidence to show that even if the proof of debt had been filed, Abdul Rashid would have been in a position to pay RM5,520,236.77 or any part thereof. Even if the certificate of indebtedness was admissible it would have been insufficient to prove the quantum of damages allegedly suffered by the respondent as a result of the appellants' negligence (see paras 38(h)–(g)).

(5) Although the respondent failed to prove the damages it had suffered, the court recognised the fact it must have suffered some amount of loss through the appellants' negligence as the respondent was wholly unable to recover any monies from Abdul Rashid. The nominal damages of RM50,000 awarded was neither miniscule nor excessive in the circumstances but reasonable given that it was difficult, if not impossible, to assess the damages in the context of the evidence adduced or the lack thereof (see paras 39 & 42).

[Bahasa Malaysia summary

Perayu-perayu, yang merupakan rakan kongsi dalam firma guaman, telah dilantik oleh responden untuk mengambil tindakan undang-undang terhadap peminjam dan tiga penjamin untuk wang yang terhutang berkaitan kemudahan kewangan. Tindakan undang-undang itu melibatkan pemfailan prosiding kebankrapan terhadap seorang penjamin ('Abdul Rashid'). Oleh kerana notis kebankrapan pertama terhadap Abdul Rashid diputuskan cacat oleh mahkamah, perayu-perayu telah diarah untuk memfailkan yang baru tetapi mereka telah gagal berbuat demikian. Tiga bulan setengah selepas arahan itu diberikan, responden mendapati Abdul Rashid telah dijadikan bankrap. Enam bulan selepas itu, tempoh had masa 12 tahun untuk responden menguatkuasakan penghakimannya terhadap Abdul Rashid bermula, tetapi sehingga tarikh itu tiada bukti hutang telah difailkan oleh perayu terhadap harta pusaka Abdul Rashid bagi pihak responden. Lebih kurang setahun

selepas had masa itu bermula, Abdul Rashid didapati tidak lagi seorang bankrap. Responden telah menyaman perayu-perayu di Mahkamah Tinggi kerana kecuaian mereka mengendalikan prosiding kebankrapan yang dikatakan menyebabkan mereka hilang peluang untuk mendapatkan semula wang yang terhutang oleh Abdul Rashid. Terutamanya, responden yang mengadu tentang kegagalan memfailkan bukti hutang terhadap harta pusaka Abdul Rashid antara masa ia mendapati bahawa dia seorang bankrap dan tarikh had masa bermula. Responden telah menuntut RM5,520,236.77 sebagai ganti rugi daripada perayu-perayu berasaskan ini adalah jumlah yang dinyatakan dalam sijil keberhutangan ('SK') yang telah dikeluarkannya kepada Abdul Rashid. Antara lain, pembelaan perayu-perayu adalah bahawa responden patut dipersalahkan kerana tidak memberi mereka penyata akaun bagi membolehkan mereka memfailkan bukti hutang. Semasa perbicaraan, responden telah menender SK itu melalui saksi yang bukan pembuat dokumen itu dan memohon untuk bergantung hanya kepada SK itu sebagai bukti jumlah ganti rugi yang dituntut terhadap perayu-perayu. Hakim perbicaraan memutuskan bahawa jumlah yang dinyatakan dalam SK itu adalah bukti konklusif tentang jumlah hutang Abdul Rashid kepada responden dan berdasarkan jumlah tersebut, hakim perbicaraan memutuskan perayu-perayu cuai 60% dalam perilaku mereka berhubung urusan responden dan responden bertanggungjawab 40% daripada sumbangan kecuaian itu kerana gagal mengemukakan kepada perayu-perayu dengan penyata akaun untuk memfailkan bukti hutang. Pembahagian itu mengakibatkan perayu-perayu diperintahkan untuk membayar responden RM3,312,142.06. Perayu-perayu telah merayu terhadap keseluruhan keputusan itu kepada Mahkamah Rayuan manakala responden merayu balas terhadap bahagian dalam perintah yang memutuskan ia bertanggungjawab 40% kerana kecuaian bersama.

Diputuskan:

(1) Responden telah gagal untuk membuktikan atas imbangan kebarangkalian kuantum ganti rugi yang dituntut. Tiada kemasukan keterangan telah dikemukakan untuk membuktikan jumlah RM3,312,142.06 atau mana-mana bahagian daripadanya sebagai ganti rugi yang dikatakan telah dialaminya. Responden hanya bergantung kepada sijil keberhutangan untuk membuktikan kuantum yang dituntut tetapi oleh kerana pembuat dokumen tidak dipanggil sebagai saksi dan berdasarkan bantahan oleh perayu, sijil keberhutangan itu tidak boleh dimasukkan sebagai keterangan. Jikapun ia diterima masuk, sijil itu sendiri tidak mencukupi untuk membuktikan ukuran kerugian yang dikatakan telah dialami oleh responden (lihat perenggan 26–28).

(2) Sijil keberhutangan telah dimasukkan sebagai keterangan oleh hakim perbicaraan dan patut dikeluarkan daripada rekod. Sijil itu telah ditenderkan oleh PW1 yang bukan pembuat dokumen itu dan perayu-perayu telah membangkitkan bantahan terhadap kemasukannya.

Tiada keterangan yang mencadangkan pembuat sijil itu telah mati, tidak sihat dari segi keadaan badan atau mental untuk hadir sebagai saksi atau 'beyond the seas' untuk hadir dalam skop proviso kepada s 73A(1) Akta Keterangan 1950. Bahkan, tiada keterangan telah dikemukakan berhubung identiti orang yang mengeluarkan dan menandatangani sijil itu, malah untuk menjelaskan kepada mahkamah kenapa orang itu tidak dipanggil sebagai saksi dan kenapa sijil itu perlu dimasukkan melalui PW1. Ia tidak penting sama ada sijil itu dikeluarkan di bawah kepala tajuk surat responden atau bahawa ia telah ditenderkan melalui pegawai atasan (PW1) pembuat dokumen itu kerana tiada peruntukan untuk kemasukan sedemikian di bawah s 7A (lihat perenggan 33, 34, 38(f)).

(3) Sijil keberhutangan telah dikeluarkan bagi tujuan perjanjian pinjaman antara responden dan peminjam dan bukan bagi tujuan retainer perjanjian antara responden dan perayu-perayu. Responden tidak boleh bergantung hanya kepada sijil keberhutangan itu untuk menjadikan perayu-perayu bertanggungjawab untuk jumlah yang dinyatakan dalam sijil itu secara kolateral. Ia bukan terma pelantikan perayu-perayu sebagai peguam cara bahawa apa-apa jumlah yang dinyatakan dalam sijil itu juga akan menjadi hutang peguam cara. Tambahan pula, tiada keterangan menunjukkan jika bukti konklusif wujud dalam jaminan yang dimasuki oleh Abdul Rashid dan jika tiada fasal sebegitu, sijil keberhutangan itu, jikapun boleh diterima masuk, bukanlah bukti konklusif untuk jumlah yang terhutang oleh Abdul Rashid (lihat perenggan 38(c)–(d)).

(4) Untuk responden berjaya dalam tuntutannya terhadap perayu-perayu hendaklah membuktikan kedua-dua fakta dan jumlah kerugian yang mungkin boleh didapatkan semula. Tidak dapat dikatakan sebanyak mana perayu-perayu mendapatkan semula daripada Abdul Rashid bagi pihak responden jika mereka tidak cuai dan telah memfailkan bukti hutang itu. Ia tidak mustahil, dan sememangnya tidak betul, untuk mahkamah perbicaraan membuat spekulasi sebanyak mana hutang itu boleh didapatkan semula daripada Abdul Rashid. Dia seorang bankrap dan tiada keterangan untuk menunjukkan jikapun bukti hutang itu difailkan, Abdul Rashid dalam kedudukan untuk membayar RM5,520,236.77 atau mana-mana bahagian daripadanya. Jikapun sijil keberhutangan itu boleh diterima masuk ia tidak mencukupi untuk membuktikan kuantum ganti rugi yang dikatakan telah dialami oleh responden akibat daripada kecuaian perayu-perayu (lihat perenggan 38(h)–(g)).

(5) Walaupun responden telah gagal untuk membuktikan ganti rugi yang dialaminya, mahkamah mengenali fakta ia mengalami sebahagian daripada jumlah kerugian itu daripada kecuaian perayu-perayu kerana responden tidak boleh secara keseluruhannya mendapat semula apa-apa wang daripada Abdul Rashid. Ganti rugi nominal RM50,000 yang

diawardkan bukan sedikit atau berlebihan dalam keadaan itu tetapi berdasarkan keadaan yang ia sukar, jika tidak mustahil, untuk menaksir ganti rugi itu dalam konteks keterangan yang dikemukakan atau yang tidak dikemukakan (lihat perenggan 39 & 42).]

Notes

For cases on admissibility, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1350–1371.

Cases referred to

Beaumont v Greathead (1846) 2 CB 494 (refd)
Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, KBD (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)
Popular Industries Ltd v Easter Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Sapwell v Bass [1910] 2 KB 486, KBD (refd)
Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun [1981] 1 MLJ 201, FC (refd)
Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2012] 2 MLJ 314, CA (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Legislation referred to

Contracts Act 1950 ss 74, 76
Evidence Act 1950 ss 34, 73A, 73A(1)(a)(i), (b), (2), 90A

Appeal from: Civil Suit No 22 NCVC-886–07 of 2012 (High Court, Kuala Lumpur)

Ranjit Singh (CK Yeoh with him) (Ranjit Singh & Yeoh) for the appellants.
M Menon (V Mugunthan with him) (Jaafar & Menon) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] On or about 29 December 1995 the respondent appointed the appellants as their solicitors to commence civil proceedings against the borrower ('Astral Master (M) Sdn Bhd') and three guarantors for the recovery of an outstanding sum of RM10,672,079.80.

A **[2]** One of the guarantors was one Abdul Rashid bin Maidin ('Abdul Rashid').

B **[3]** On 17 May 1996 the respondent entered into a consent order with Abdul Rashid and other defendants for the said sum of RM10,672,029.80 with interests and costs. The consent order was amended on 9 July 1996.

C **[4]** As the debtors were in default of payment of the judgment sum, the respondent instructed the appellants to commence bankruptcy proceedings against Abdul Rashid and another guarantor.

[5] The appellants served the bankruptcy notice dated 24 May 2000 on Abdul Rashid on 23 November 2001.

D **[6]** On 10 November 2004, Abdul Rashid challenged the validity of the bankruptcy notice but his application was dismissed by the senior assistant registrar on 30 June 2006.

E **[7]** On appeal to the judge in chambers, the learned judge allowed the appeal on 13 July 2007 on the ground that the bankruptcy notice was defective in that it contained the sum of RM669.75 as costs which were not provided for in the amended court order.

F **[8]** On 30 July 2007 the respondent instructed the appellants to file an appeal to the Court of Appeal and at the same time to file a fresh bankruptcy notice against Abdul Rashid. The appellants filed the notice of appeal on 9 August 2007 but failed to file a fresh bankruptcy notice between 30 July 2007 and 15 November 2007.

G

[9] On 15 November 2007 the respondent discovered that Abdul Rashid had been adjudged a bankrupt on 4 October 2007.

H **[10]** As the consent order was entered on 17 May 1996 the 12 year limitation period to enforce the judgment expired on 17 May 2008.

[11] Up till the expiry date of 17 May 2008, the appellants did not file a proof of debt with the official receiver on behalf of the respondent.

I

[12] On another bankruptcy search made on Abdul Rashid on 5 March 2009, that is after limitation had set in, it was discovered that Abdul Rashid was no longer a bankrupt.

[13] The appeal to the Court of Appeal filed on 9 August 2007 was withdrawn by the respondent on 15 October 2010.

[14] On 8 March 2012, the respondent issued a certificate of indebtedness stating that Abdul Rashid was indebted in the sum of RM5,520,236.77.

THE RESPONDENT'S PLEADED CASE

[15] The respondent's claim was premised on the implied terms of the appointment of the appellants that they would exercise reasonable skill and care in carrying out their duties as solicitors for the respondent. The respondent claimed that due to the negligence of the appellants in the conduct of the bankruptcy proceedings against Abdul Rashid they had lost the opportunity to recover any moneys due and owing from Abdul Rashid, pursuant to the amended consent order of 17 May 1996. The respondent in particular, complained that the appellants had failed to file the proof of debt within the time permitted or at all after Abdul Rashid had been adjudged a bankrupt on 4 October 2007 till limitation set in on 17 May 2008.

[16] The sum claimed by the respondent against the appellants was RM5,520,236.77 being the sum stated in the certificate of indebtedness issued by the respondent to Abdul Rashid.

THE DEFENCE

[17] The appellants of course denied all allegations of negligence in the conduct of the civil suit as well as the bankruptcy proceedings. Significantly, the appellants' defence and answer to the non-filing of the proof of debt was that the respondent had themselves failed to furnish the statements of accounts in respect of Abdul Rashid's account to enable the appellants to have filed the proof of debt.

DECISION OF THE HIGH COURT

[18] After a full trial the learned trial judge held the appellants 60% liable for negligence in their conduct of the respondent's affairs and the respondent 40% liable for contributory negligence when the respondent omitted/failed to furnish the statements of accounts to the appellants for the filing of the proof of debt.

[19] The learned trial judge ordered the appellants to pay the sum of RM3,312,142.06 being 60% of the sum of RM5,520,236.77 stated in the certificate of indebtedness, together with interests and costs.

[20] Being dissatisfied with the decision the appellants appealed against the whole of the decision and the respondent cross appealed against that part of the order holding them 40% liable for contributory negligence.

DECISION OF THE COURT OF APPEAL

[21] Upon reading the *Rekod Rayuan* and the written submissions of counsel for the appellants and respondent and upon hearing the oral submissions of counsel aforesaid the court unanimously made the following orders:

(a) the cross appeal by the respondent was allowed in that the appellants were held to be fully liable. The order of contributory negligence of 40% made by the learned trial judge against the respondent was set aside;

(b) the appeal by the appellants was allowed in part in that while the appellants were found to be 100% negligent in the conduct of the case as solicitors, the order of damages in the sum of RM3,312,142.06 was set aside;

(c) nominal damages of RM50,000 was ordered to be paid by the appellants to the respondent; and

(d) no order as to costs.

APPLICATION FOR LEAVE TO APPEAL TO THE FEDERAL COURT

[22] Being dissatisfied with part of the decision of the court, the respondent has applied for leave to appeal to the Federal Court.

[23] The appellants however, have not similarly applied for leave to appeal against that part of the decision which held the appellants 100% liable for negligence.

[24] Accordingly, the grounds of judgment in this case will only deal with the issue of dismissal of the claim for damages by the respondent.

[25] By not applying for leave to appeal against the finding on 100% liability, the appellants are presumed to be satisfied with that part of the decision.

GROUNDS OF DECISION

[26] The court in allowing the appellants' appeal in part set aside the decision of the learned trial judge on damages on the ground that the respondent had failed to prove on a balance of probabilities, the quantum of damages claimed.

[27] In our judgment we are of the view that there was no admissible evidence adduced by the respondent to prove the sum of RM3,312,142.06 or any part thereof as damages suffered by the respondent. The respondent had merely relied on the certificate of indebtedness as the basis to prove the quantum claimed but as the maker of the document was not called as a witness and in the face of an objection by the appellants, the court ruled that the certificate of indebtedness was inadmissible in evidence.

[28] The court further held that even if the certificate of indebtedness was regarded as admissible in evidence, the certificate of indebtedness itself was insufficient to prove the measure of loss suffered by the respondent.

INADMISSIBILITY OF THE CERTIFICATE OF INDEBTEDNESS

[29] The admissibility of documentary evidence in civil cases is governed by s 73A of the Evidence Act 1950.

[30] Pursuant to s 73A(1)(a)(i) and (b) of the Evidence Act, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible in evidence of that fact if the maker of the statement had personal knowledge of the matters dealt with by the statement and if the maker of the statement is called as a witness in the proceedings.

[31] It was incumbent on the respondent therefore to have called Habsah bt Yasin, the maker of the certificate of indebtedness as a witness, unless of course the proviso to s 73A(1) which reads:

> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

applied.

[32] The respondent had sought to admit the certificate of indebtedness as evidence by calling Ong Boon Yow ('PW1') to tender the document as an exhibit. But PW1 was not the maker of the certificate of indebtedness. Despite that fact and the objection raised by counsel for the appellants, the learned trial judge had nonetheless admitted the certificate of indebtedness as evidence and marked it as exh P1.

[33] In our judgment we are of the view that the certificate of indebtedness, with respect, was wrongly admitted into evidence. There was no evidence to

suggest that the maker of the certificate of indebtedness was either dead, or unfit by reason of his bodily or mental condition to attend as a witness or was beyond the seas to come within the ambit of the proviso to s 73A(1). In fact no evidence was led as to the identity of the person who had actually issued and signed the certificate of indebtedness dated 8 March 2012, let alone to explain to the court why that person was not called as a witness and that it was sought to admit the certificate of indebtedness through the evidence of PW1.

[34] As the certificate of indebtedness was erroneously admitted as an exhibit, it ought to be expunged from the record. In *Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201, it was held that a document which is inadmissible as evidence because the maker was not called as a witness shall remain inadmissible and be disregarded in its entirety.

[35] It is significant to note that for some untold reason the respondent did not at any time attempt to rely on the provisions of s 73A(2), which provides:

> (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:
>
> (a) notwithstanding that the maker of the statement is available but is not called as a witness; and
>
> (b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

If indeed the respondent was in such a position. For the learned trial judge to act under s 73A(2) it would have been imperative for the respondent to move the court to do so.

[36] Further, it will be noted that for some unexplained reason the respondent did not alternatively attempt to admit the certificate of indebtedness into evidence as a document pursuant to the provisions of s 90A of the Evidence Act, if indeed the document was produced by a computer. If the background facts had been laid by the respondent, arguments on admissibility under s 90A would have been enlightening.

[37] In conclusion on the point of admissibility under s 73A(1)(a), the court is of the view that the respondent would not be able to tender the certificate of indebtedness as evidence through PW1 under s 73A(i)(a)(ii) as PW1 was not the maker of the statement.

CERTIFICATE OF INDEBTEDNESS NOT CONCLUSIVE EVIDENCE OF INDEBTEDNESS AGAINST THE APPELLANTS

[38] In the event the court is wrong to exclude the certificate of indebtedness as evidence from the record, we wish to address the following points below:

(a) the principle on the effect of a certificate of indebtedness has been well established by the oft-cited decision of the Federal Court in the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544, which stated that a certificate of indebtedness is conclusive evidence of indebtedness by the borrower of the sum stated therein. In *Cempaka Finance Bhd* it was also held that the certificate of indebtedness excused the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed;

(b) however, before the certificate of indebtedness can become operable and binding, there must firstly be in existence a 'conclusive evidence clause' in the agreement between the lender and the borrower;

(c) in the present case there was no such clause in the express and/or implied terms of retainer of the appellants as solicitors. In any event the certificate of indebtedness was issued by the respondent for purposes of the loan agreement between the respondent as the lender bank and Astral Master (M) Sdn Bhd as the borrower and not for purposes of the retainer agreement between the respondent and the appellants. The respondent cannot merely rely on the certificate of indebtedness to hold the appellants liable for the amount stated in the certificate of indebtedness collaterally. It simply was not a term of the appointment of the appellants as solicitors that any sum stated in the certificate of indebtedness issued would also became the debt of the solicitors;

(d) further and in any event, there was no evidence proven to show that there was a conclusive evidence clause in the letters of guarantee executed by Abdul Rashid. And if there was no such clause, then the certificate of indebtedness, even if admissible, would not be conclusive evidence of the amount owing by Abdul Rashid as a guarantor;

(e) we are of the view that if the certificate of indebtedness was admissible in evidence, it would have, notwithstanding the provisions of s 34 of the Evidence Act, and contrary to the submission of counsel for the Appellants, been able to show the amount owing by Abdul Rashid if indeed, there was a conclusive evidence clause in the agreement between Abdul Rashid and the respondent (see *Popular Industries Ltd v Easter Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and s 34 of the Evidence Act);

(f) In her grounds of judgment, the learned trial judge allowed the

certificate of indebtedness to be admitted since 'the certificate was issued under the plaintiff's letterhead and tendered through PW1, Ong Boon Yow, who is the Head of Large and Medium Loans, in Special Assets Management, and therefore the superior of Habsah' notwithstanding the objection of counsel for the appellants that the certificate of indebtedness was not admissible since the maker was not called to court to tender it. However, we are unable to agree with the learned trial judge and accept the reason given for the admission of the certificate of indebtedness. Under s 73A of the Evidence Act it mattered not whether the certificate of indebtedness was issued under the respondent's letterhead and tendered through the superior officer of the maker of the certificate of indebtedness as there is no provision for such admissibility under s 73A;

(g) apart from the certificate of indebtedness as the purported evidence, there was nothing else adduced to show what was in fact owing by Abdul Rashid. It must be remembered that Abdul Rashid was adjudged a bankrupt on 4 October 2007 and thus deemed insolvent in law. There was no evidence to show, even if the proof of debt had been filed by the appellants at the material time, that Abdul Rashid would have been in a position to pay the sum of RM5,520,236.77 or any part thereof. It was simply not possible, indeed not correct, for the court to speculate how much of the debt was recoverable from Abdul Rashid. The respondent by claiming the sum against the appellants was taking the simplistic view that as Abdul Rashid was indebted for the full sum as per the certificate of indebtedness then the appellants would therefore be similarly indebted to the respondent. As submitted by counsel for the appellants, no witness was called from the Insolvency Department to testify as to the state of the financial affairs and standing of Abdul Rashid; of how many creditors in all had filed their Proofs of Debt and how much in the dollar each creditor could be expected to recover from the estate of Abdul Rashid, if at all. There was simply no telling how much the appellants could have recovered from Abdul Rashid on behalf of the respondent if the appellants were not negligent and had filed the proof of debt accordingly. Even PW1 was unable to say anything positive on the chances of recovery from Abdul Rashid;

(h) for the respondent to succeed in their claim against the appellants, they had the burden of proving both the fact and the amount of damages that could be recovered. The certificate of indebtedness, even if admissible, would have been insufficient, for reasons discussed above, for the respondent to prove the quantum of damages suffered by them as a result of the negligence of the appellants;

(i) it is trite that for the respondent to be able to claim for damages against the appellants, the respondent must prove their damages (see ss 74 and

76 of the Contracts Act 1950). The way the respondent had gone about to prove their claim against the appellants fell far short of what was enunciated by Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 where His Lordship said:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

(j) those illuminating words were spoken by Lord Goddard way back in 1948 and not surprisingly they still ring true till today (see also *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 and *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17);

(k) on the burden of proving both the fact and the amount of damages Ong Hock Thye FJ (as he then was) in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 spoke of the burden of proof in this way: and

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damages he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174.

(l) further, we are of the view that as the certificate of indebtedness was not admissible in evidence there was no burden on the appellants to lead any evidence to prove that the amount owing as stated in the certificate of indebtedness was erroneous. The learned trial judge was thus in error when holding that 'the amount as stated in exh P1 can be accepted by the court as conclusive proof of what is currently owing by Abdul Rashid to the plaintiff'.

NOMINAL DAMAGES

[39] Although it was the finding of this court that the respondent had failed to prove the damages suffered by way of the certificate of indebtedness, the court nonetheless recognised the fact that the respondent must have suffered some amount of loss through the negligence of the appellants as the respondent was wholly unable to recover any sums of money from Abdul Rashid.

[40] In the circumstances, while the court could not accept the finding of the learned trial judge that the respondent had lost the sum of RM5,520,236.77 (or RM3.312,142.06 being 60% of the total sum) or any lesser sum, the court was only prepared to award the sum of RM50,000 to the respondent as

nominal damages. This sum was awarded notwithstanding the submission of counsel for the respondent that a sum of RM500,000 should be awarded as nominal damages.

[41] In *Beaumont v Greathead* (1846) 2 CB 494 at 449, Maule J described nominal damages as 'a sum of money that may be spoken of, but that has no existence in point of quantity'. Often nominal damages are referred to as a token sum awarded where the amount could be small or miniscule (see *Sapwell v Bass* [1910] 2 KB 486).

[42] In the case before us, we are of the view that the sum of RM50,000 awarded as nominal damages as opposed to substantial damages, is neither miniscule nor excessive in the circumstances. The sum is reasonable given that there was insufficient evidence adduced by the respondent to prove damages. Taking the case as a whole we are of the view that it was difficult if not impossible, to assess the damages in the context of the evidence adduce or the lack thereof (see *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 2 MLJ 314 (CA)).

CONCLUSION

[43] In the result, the court unanimously held that while the respondent had succeeded in proving liability on a 100% basis against the appellants, the respondent had failed to prove the quantum of damages suffered due to the negligence of the appellants.

[44] Accordingly the appellants' appeal was allowed only in part while the respondent's cross appeal was allowed.

[45] The respondent was awarded nominal damages of RM50,000.

[46] No order as to costs was made to either party.

Order accordingly.

Reported by Ashok Kumar